

United States of America
Middle District of Florida
Tampa Division

United States of America

vs.

Case no. 8:03-CR-77-T-30-TBM

Sami Amin Al-Arian, et al.

Memorandum of Law
Concerning Legal Defense Functions to
Insure Effective Self-Representation

FILED
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA
JAN 14 2004

I. Introduction

The defendant submitted a motion to the Honorable Court seeking its assistance in safeguarding his due process and equal protection constitutional rights. As a pre-trial pro se detainee, the Court's disposition must be to afford the defendant, not only the presumption of innocence, but also all the tools needed by the defendant to have an adequate, effective, and meaningful access to the Court (*Bounds v Smith*, 430 US 817, 72, 79 (1977).)

When a defendant asserts his constitutional right by waiving his appointed legal counsel, *Farretta v California*, 422 US 806 (1975), as this Honorable Court recognized, he does not waive his right to have adequate, effective and meaningful access to the Court. Nor does he, as asserted by the government,

by choosing self-representation must bear the difficulties brought by such decision upon himself. It is well established that the assertion of one constitutional right cannot compromise another constitutional right.

The defendant in his motion to compel the government to facilitate legal defense functions to insure self-representation as a pre-trial detainee, is asking the Court to intervene and assure minimum requirements needed for due process and equal protection constitutional rights. Many of the requests asked by the defendant are common sense requests that do not in and of themselves compromise security of the detention facility. The Court should not refrain from inquiring about the real reasons behind many denials in the name of security. While the main objective of the detention facility is to maintain security, good order and discipline, the main objective of the Court is to insure a fair trial and protection of all constitutional rights. Hence, the Court is requested to consider in its attempt to balance these two, and sometimes conflicting, objectives, its primary objective.

Furthermore, it was the government's motion to deny the defendant bail. It was the government decision to hold the defendant in a federal penitentiary, which its administrators admit unable to deal with pre-trial detainees. It was the government's decision to place the defendant in the most restrictive environment in the Special Housing Unit (SHU.) In other words, the government could

have elected to allow him bail with whatever restrictions it deemed acceptable, or elected to detain him in less restrictive environment and thus giving him a fighting chance to mount an adequate, effective and meaningful defense. Hence, the defendant is in a catch-22 situation in his ability to defend himself, and thus requests the intervention of the Court to address this situation and order the relief.

II. Pre-Trial and Pro Se Detainee

This Honorable Court must consider not only that it's dealing with a pre-trial detainee but also with a pro se status as well. In many cases, the Courts have dealt with one or another or a pro se convicts.

It's important to note that "the 'essential objective of pre-trial confinement is to insure the detainee's presence at trial,'" *Bell v. Wolfish*, 441 U.S. 520, 60 L Ed 2d 447, 1861 (1978). Furthermore, *Bell* established that in evaluating the constitutionality of conditions of restrictions of pre-trial detention which implicate due process rights, proper inquiry is whether those conditions or restrictions amount to punishment of detainees.

In *Taylor v. Sterrett*, 532 F 2d 462, (5th Cir. 1976), the 5th Circuit Court ~~stated~~ that before procedures that impose prisoner's access to the Courts may be constitutionally validated, it must be clear that the state's substantial interests cannot be protected by less restrictive means (at 472). In other words if a legitimate request by the defendant in his pursuit for adequate, effective and meaningful access to the court

can be achieved without compromising the government's interest, namely security, by using less restrictive means, then it's incumbent upon the government to provide such access. Moreover, cost cannot be considered as a legitimate government's interest (such as cost of housing, transportation, or other factors). Bounds established that "the cost of protecting a constitutional right cannot justify its total denial." (at 81.)

Another factor that the Court must consider in this case in its evaluation of conditions of restrictions, is not only their impact on the defendant as a pre-trial detainee, but perhaps equally or more important on him as a pro se. Hence, any act by the government that diminishes or hampers the defendant's adequate, effective and meaningful access to the court is essentially a punishment that is perhaps more injurious, since it may affect the outcome of his trial and the ability to have a fair trial. At the very least, the government should not be allowed to place conditions of restrictions that also delay the trial date and hence lengthens the pre-trial detention.

Bounds firmly established that pro se detainee has no less rights than a legal counsel. It stated "a lawyer must know what a law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner (at 81.)

III. Restrictions placed on the defendant

As abhorrent as his conditions of confinement might be the defendant is not contenting such conditions in this motion. The court is, rather, requested to focus its attention on the narrower subject of what undue restrictions, which are imposed on the defendant, that negatively impact his due process and equal protection rights, as well as adequate, effective and meaningful access to the courts. If the court finds any restrictions which affect the above concerns, it must intervene because such restrictions become punitive.

In *Block v. Rutherford*, 468 U.S. 576, 82 L Ed 2d 438 (1984), the court stated "if a restriction or condition is not reasonably related to a legitimate goal, if it is arbitrary or purposeless - a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."

The requests which the defendant has submitted to the Honorable Court are most reasonable for a prose detainee, and for a case of such magnitude and complexity. The main (and possibly only legitimate) argument by the government is institutional security. It has already been established through Bounds above that cost is not a factor in the denial of constitutional rights such as due process, equal protection, or adequate, effective and meaningful access to the courts. Likewise inconvenience or providing the defendant with "extra privileges not available to other SHU convicts should obviously not even be considered.

Hence, the defendant realizes that institutional security,

is a legitimate concern but that the two objectives of guaranteeing constitutional rights and maintaining security can be accommodated. Security should not be used in an arbitrary and elastic way as to deny the defendant his constitutional rights.

IV. Forms of Relief requested from the Court

The motion submitted by the defendant to the Honorable Court on July 25, 2003 requested 15 forms of relief to insure his due process, equal protection, and adequate, effective, and meaningful access to the Court. All of them could be accommodated without compromising institutional security.

1. Opening Incoming Legal Mail

The defendant is requesting nothing more than following the procedure outlined in Program Statement 5265.11 titled: Correspondence (7/9/99). It states on page 18 section 16(a): "Staff shall mark each envelope of incoming legal mail (mail from courts or attorneys) to show the date and time of receipt, the date and time the letter is delivered to an inmate and opened in the inmate's presence, and the name of the staff member who delivered the letter. The inmate may be asked to sign as receiving the incoming legal mail." Out of 35 properly designated letters, staff followed the procedure outlined above only one time. The Court is requested to compel the government to follow this procedure.

2. Access to the Main Law Library

The right of adequate, effective and meaningful access to the court has already been established in *Bounds v Smith*. *Bounds* also stated that "without a library, an inmate will be unable to rebut the State's argument." (at 81-82.) Here, the court needs to examine 3 issues: (a) does a pro se detainee have a right to access law libraries?, (b) does the law library in the SHU unit satisfy the minimum requirements of constitutional definition of adequate, effective and meaningful access?, and (c) in the absence of legal research tools, is the defendant able to identify on his own and without any access to the main law library his needs so that a staff person can bring them for 72 hours or copy them as the government contends?

In its attempt to answer the first question, the government presented 3 cases, namely, *U.S. v Byrd*, 208 F3d 592 (7th Cir. 2000), *U.S. v Chatman*, 584 F2d 1358 (4th Cir. 1978), and *Bribiesca v Galeza*, 215 F3d 1015 (9th Cir. 2000.) It must be noted that in *Byrd* (7th Cir.) and *Chatman* (4th Cir.) the courts held that pro se prisoners have no constitutional right to a law library. Both cases involved convicted felons, and *Byrd* cited *Chatman* for its decision. *Bribiesca* (9th Cir.) also involved a convicted felon, but the Court reached a completely different conclusion. It affirmed that the pro se defendant had right to access law books or other tools in preparation of his defense. Since none of these rulings are controlling, *Bounds* should give

clear guidance as quoted above. Moreover, the Court should be guided by 2 principles: (a) a defendant should not be forced to exercise one constitutional right over the exclusion of another, i.e. the right of self-representation vs. the right of adequate, effective and meaningful access established by *Bounds*, and (b) the doctrine of injunctive relief upon imminent injury, since it's certain that if the defendant is prevented to have meaningful and timely access to law books and library, his preparation for his defense will be irreparably harmed.

The second question before the court is easily answered. The references available are outdated, incomplete and insufficient. For instance, this case needs heavy research on past *FISA* cases, anti-terrorism legislation and cases, the *PATRIOT Act*, etc. None of these materials are available. It's also important to distinguish *Lewis v Casey*, 518 US 343, 135 L Ed 2d 606 (1996) and the defendant's status. *Lewis* deals with convicted inmates who might be deprived of frivolous claims that "deprives that person of nothing except perhaps punishment or sanctions." (at 610.) *Lewis* also acknowledges the role of the court "in granting relief against actual harm that has been suffered or imminently will be suffered by a particular individual or class of individuals", that it "orders the alteration of an institutional organization or procedure that causes the harm." It should be abundantly clear that the defendant's effective and meaningful defense will imminently suffer if he is deprived from adequate access to the main law library.

As far as *Martucci v Johnson*, 944 F. 2d 291 (6th Cir. 1991), it must be noted that the conditions imposed

on the defendant as a pre-trial detainee were reasonable because: (a) it was established that he was trying to escape from the facility, and (b) his segregated confinement was for only 8 days. Hence, the court established that his restrictions were "reasonably related to legitimate government objective of aborting his escape." (at 291.) Furthermore, the defendant during his 8 days of sanctions was represented by counsel and not acting in a pro se status (at 292.)

The third question could also easily be answered. It's the basic definition of meaningful research to have access to all available materials before selecting which ones are needed. Asking the defendant to request a staff member to obtain materials from the main library as stipulated by the government is like asking a staff member to conduct research on behalf of the defendant. This procedure even if practical, is inefficient and costly. If the defendant requests research on FISA, then what are the criteria by which the staff member will use in order to select the references? How costly would it be? And if the staffer misses an important reference who is responsible for the potential harm?

Bounds recognized that "judicial restraint is often appropriate in prisoners' rights cases," but it added affirmatively that it held that district courts must intervene because such policy "cannot encompass any failure to take cognizance of valid constitutional claims." (at 85.) The defendant requests the court to allow the defendant access to the main law library at least 2 times per week, with each time up to 4 hours. The prison

staff could take whatever security precautions needed to preserve institutional security including having a staff observing the defendant or using the library in its off hours if need be. Bounds affirmed a plan where prisoners could be transported from facilities that do not have adequate law libraries to others that do, in order to insure access to the courts.

3. Access to a Lap-Top Computer and other peripherals

On August 19, 2003, two security officers from the Justice Department and who represented the Court told the defendant that in the near future he would be allowed to listen to "thousands" of telephone intercepts which are being currently recorded on CDs. The lap-top computer has also been identified as the medium of the listening device. Hence, the security argument of having a lap-top computer in the defendant's cell is dispelled.

Hence, the issue before this Court is this: how is the institutional security going to be affected if the lap-top in the defendant's cell has software capability (like wordprocessing) in addition to other software that would allow listening to CDs?

As for the use of printers, there are several printers in the SHU unit. The defendant could be allowed to print his motions or other pertinent information by accessing such printers, or by allowing him to use the private telephone room in the B range for 1 hour twice a week so he can print all his motions on a printer that can be stored and retrieved when under use.

The government cites in its motion a old 5th Circuit cases, namely *Durham v Blackwell*, 409 F.2d 838 (5th Cir. 1969), and *Williams v US Dept. of Justice, Bureau of Prisons*, 433 F.2d 958 (5th Cir. 1970). First, it's important to note that both decisions are pre-Bounds. Secondly, both cases are distinguishable as both involved post convictions' representations as supposed to the defendant's status as a pre-trial detainee in a complex, multi-defendant, with numerous and heavy motions with strict deadlines. Thirdly, it's apparent in the *Durham* decision that the 5th Circuit affirmed a decision by the district court to uphold a prison regulation to refuse accepting typing any material to prisoners rather than allow prisoners to type their own motions. On the other hand, in *Williams* the Court affirmed the prison regulation against inmate use of typewriters, but it only cited *Durham* as the reason for rejection.

However, *Williams* acknowledged the Supreme Court's mandate set forth in *Johnson v Avery*, 393, US 483, 89 S. Ct. 747, 21 L. Ed2d 718 (1969.) *Johnson* held that "a prison regulation prohibiting inmate assistance in the drafting of pro se legal papers constituted a deprivation of due process law, where no 'reasonable alternative' was available to furnish legal advice." The government's suggestion that "the defendant can handwrite any motions he desires to file," are neither reasonable nor efficient nor practical.

4. Access to Writing Materials

Depriving the defendant of pencils, erasers, legal pads and other stationeries is detrimental to any notion of fairness or justice. The use of the "safety pen" is not practical and inefficient. On the other hand, the use of the mechanical pencil with eraser is practical and efficient. The Coleman administration objects on the basis that the plastic mechanical pencil might be "perceived as a weapon." The underlying assumption behind this perception is that all SHU inmates are convicted felons who are either in Disciplinary segregation because they have committed an institutional violation and are being punished, or they are in Administration Detention because they are under investigation for committing a violation, or voluntarily requesting protection. The defendant is an innocent pre-trial detainee who did not request to be in the SHU unit. Had the defendant been placed in the general population, his status and privileges would have been completely different including the use of mechanical pencils, and other stationeries. Exhibit C provides ample evidence where convicted felons in the general population are provided pens and pencils (assumed to be weapons in the SHU) while an innocent pre-trial prose detainee is deprived from such necessities to mount meaningful and effective defense. The defendant is willing to work out any arrangement with the prison administration to account for the

pencil and erasers on a daily basis. Other stationeries such as plastic paper clips, legal pads, a calculator, folders, binders, envelopes and the like should also be admitted to assist the defendant in mounting adequate, effective and meaningful defense. Even Bounds acknowledged that things like "writing paper" are part of access to the courts.

5. Books from Publishers

The government contends that: (a) the defendant is not authorized to receive a hardcover book, and (b) only softcover books are authorized by the publishers. This statement is in direct contradiction of BOP program Statement 5266-09, titled:

Incoming Publications, dated 7/29/99. It states in section 6(a) the following: "An inmate may receive hardcover publications and newspapers only from the publisher, from a book club, or from a bookstore. An inmate may receive other softcover material from any source." The same policy is repeated verbatim in the Coleman Admission & Orientation Handbook on page 28. The defendant only requests that this policy be also adhered to with respect to him, no more and no less.

6. Legal Visits for a pro se, pre-trial Detainee

According to the Coleman Admission & Orientation Handbook, there are two categories of classification in

the SHU unit, namely Disciplinary Segregation (DS) and Administrative Detention (AD), p. 34. The defendant is classified as AD. The handbook states that "Inmates in Administrative Detention shall be provided with the same general privileges as inmates in general population to the extent practical and specific security concerns are not compromised (p. 34.) The handbook further states that inmates housed in the SHU unit "are permitted to participate in the normal (i.e. contact) visiting program in the Visiting Room unless compelling reasons exist to preclude it." (p. 35.) Compelling reasons are either legal sanctions or per the Captain. However, the handbook states unambiguously that switching from contact visitation to non-contact visitation for social visits - as an administrative decision (rather than penal) - "will only be taken against those who lost visiting privileges as a result of being found guilty of any drug-related incident report." (p. 35.) The defendant has not been found guilty of any crime much less a drug-related one for the Coleman administration to forbid contact visits.

Despite this flagrant violation of its own policy, the defendant is asking the Court to sanction legal contact visits where the defendant must be able to meet and discuss his case with legal advisors, private investigators, forensic financial experts, potential witnesses, etc. Any adequate, effective and meaningful defense will simply be impossible without such access. The visiting room has 4 conference rooms where at least one has

always been available that the defendant can utilize. The defendant is also requesting a relief from the court that when an out-of-town visitor related to his defense visits, that the 3 pm rule is relaxed so as not to burden the defendant economically or the time constraints on the visitor.

The government in its motion acknowledges such rights for any officer of the court. It totally ignores the fact that the defendant in his pro se status is indeed an officer of this court.

7. Photocopying

The defendant does not request the court for free, unlimited access to photocopies. The case cited by the government, *Wanninger v. Davenport*, is clearly a case of post-conviction, which is easily distinguishable from a pro se pre-trial detainee, with numerous time-sensitive materials, and court imposed deadlines. In addition, this case involves at least 5 legal counselors in addition to the Court. It's simply impossible for the defendant to mount an adequate, effective, and meaningful defense and to exercise his due process rights if prevented from regular access to the photocopier.

Indeed if the defendant is given access to the main law library twice a week, he could also purchase a copy card and do all the copying needed while at the law library. There does not

seem to be any penological reason not to give the defendant access to such important and essential facility for the exercise of his due process rights and the right of access to the court.

8. Possession of Documents

It should be abundantly clear that the defendant has a due process interest, which is acknowledged by the courts, that work product and privileged materials are protected from the opposite side.

In this instance, the defendant is only seeking the assistance of the court by insuring that his privileged work product will not be compromised. The Justice Department that is prosecuting this case is the same entity that is holding the defendant. The injury against the defendant could be enormous if such privileged work product is compromised. The cases cited by the government, namely *Brown v Dugger*, (5th Cir.), and *Sowell v Vase* (1st Cir.), seem to be for post convictions which are distinguishable from the status of the defendant. Furthermore, the decision states that no violation occurs because of no showing of actual injury. But in this case, the government is actively prosecuting the case which is quite different from an appeal filed after conviction. Clearly, actual injury of a compromised defense is enormous and it would be difficult if not impossible to recover from.

The defendant has no objection to store publicly available documents or documents turned over by the government provided that such material can be recovered immediately upon request. However, the defendant proposes

that a storage and working area cell be provided for the defendant and his codefendant in the cell across from their cells. This reasonable proposal would satisfy the defendant's concerns as well as the government's understandably safety objectives. Moreover, the defendant acknowledges the prison's policy of irregular or random "shakedowns" provided that his privileged work product is not compromised.

9. Monitoring of Pre-Trial Detainees

The defendant does not object to the institutional procedure's of surveillance for security reasons. However, the defendant insists on his right to have his conversations and discussions especially with respect to his status as a prose protected from the government's audio surveillance. The defendant expects that all his conversations (both contact or over the telephone) with his legal advisors, experts, private investigators, and potential witnesses, approved by the court, are free from the government's intercepts. Otherwise, a compromised defense would violate the defendant's due process rights.

Furthermore, the government cites *Hudson v. Palmer*, 468 U.S. 517, (1984), as a basis for constant monitoring and surveillance by staff. However, *Hudson* dealt with search and seizure and the Fourth Amendment. It did not waive the constitutional right of due process, where an uncompromised defense is inherent to its preservation. Secondly, it's clear that the case involved convicted inmates and not innocent pre-trial detainees. For instance, the majority opinion talked about persons in the prison who "have a demonstrated proclivity for antisocial criminal,

and often violent, conduct." The decision does not address the status of pre-trial detainees, much less a pre-trial prose with constitutional due process rights of a fair trial. Needless to say, convicted felons are different from pre-trial detainees. *Bell v Wolfish*, 441 U.S. 520, 60 L Ed. 2d 447 (1979), established that while certain restrictions on convicted felons could be constitutional if the objective is punishment, the same restrictions cannot apply to pre-trial detainees. Furthermore, if a condition or restriction is arbitrary or purposeless, court may permissibly infer that purpose of government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees (at 1862).

The government's contention that the defendant's conversations which are related to his defense if are unmonitored compromise institutional security is groundless. The defendant proposes that - if the court demands it - he submits to the court a list of persons relevant to his defense. Once approved by the court (in *ex-parte*), the list is given to the prison administrators (*ex-parte*). The defendant would be able to communicate with the people on the list as, well as have contact visits. If the court wishes, the list may be updated every 90 days. Such arrangement will protect the defendant's due process rights as well as eliminate any security concerns.

10. Legal Phone Calls

The government's motion totally ignores the prose status of the defendant. It's simply impossible for the defendant to mount an adequate, effective, and meaningful defense without access to the telephone. The defendant's use of the phone is for his legal calls only, not social calls. Although the sanctions on the defendant to suspend his social calls are being appealed, the decision has nothing to do with this request. The BOP program statement PSS264.07 (1/31/2002), titled: Telephone Regulations for Inmates, states:

"The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate."

This policy should apply to all defense-related calls of the defendant. Hence, the defendant should be able to use the telephone in a regular basis to facilitate his defense. The court may give (ex-parte) the prison's administration a pre-approved list of all individuals who are deemed by the Court as persons whom the defendant needs to communicate with to insure due process and the right to present witnesses and confront evidence. The Court may review this list every 90 days. All such calls must be, by virtue of being part of the defense, unmonitored.

The SHU unit has a telephone in a conference room in range B that can be utilized for such calls since a phone is already placed there. The hardship on the institution would be minimal since

The defendant is already entitled to legal calls. The only addition by the Honorable Court is the ability to contact expert witnesses, potential witness, private investigators and the like.

V. Conclusion

Wherefore, the defendant prays that the Honorable Court will grant the defendant his motion of July 25, 2003 to Facilitate Legal Defense Functions to insure Effective Self-Representation as a Pre-Trial Detainee.

Respectfully Submitted
Sami A. Al-Arian

Date: August 25, 2003
Coleman Federal Prison

Sami A. Al-Arian

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing motions and memorandum of law has been furnished by U.S. Mail to the office of the United States Attorney, Terry Furr, Assistant U.S. Attorney, 400 N. Tampa St., Suite 3200, Tampa, FL, 33602; Donald Horrox, Assistant Public Defender, 400 N. Tampa St., Suite 2700, Tampa, FL 33602; Daniel Hernandez, Esq., 902 N. Armenia Ave., Tampa, FL, 33609; and Bruce Howie, Esq., 5720 Central Ave., St. Petersburg, FL, 33707,
this 25th day of August, 2003.

Sami A. At-Arian

Sami A. At-Arian